

Migration and Security in times of the refugee crisis – Perspectives for Dublin and Schengen

Peter Rodrigues

Table of Contents

I.	Introduction	181
II.	Current Trends in Immigration	183
III.	EU-Turkey Agreement	185
	1. Returns to Turkey and Resettlements to the EU	185
	2. Safe Third Country	187
	3. Relocation from Greece and Italy	188
IV.	Dublin Regulation	189
	1. Dublin III	190
	2. ECtHR 21 January 2011 (M.S.S. v. Belgium and Greece)	192
	3. ECJ 21 December 2011 (N.S. v. UK)	193
	4. Indirect Refoulement	194
V.	Schengen	195
	1. Database Systems	195
	2. Security	196
VI.	Conclusions	199

I. Introduction

The negotiations to form a new Dutch government collapsed mid-May 2017. The ruling Liberals (VVD: 33 seats out of 150), the fellow liberal Democrats '66 (D66: 19), the Christian Democrats (CDA: 19) and left-wing Greens (GroenLinks: 14) had been in talks on forming a four-party coalition since

the general election on 15 March 2017.¹ The negotiations collapsed because the left-wing Greens could not accept the proposed policy on immigration, which included the external processing of asylum claims and reception of asylum seekers outside of the EU, for instance in countries in North Africa. The background to this proposed policy was a response in relation to the recent developments in the EU and whether external processing should be based on agreements like the EU–Turkey Agreement of 18 May 2016.² According to the left-wing Greens, the proposed policy in practice would not meet the standards of the Refugee Convention and international human rights law.

These developments above demonstrate that immigration policy is high on the political agenda as well as the pressure to outsource asylum procedures both in the Netherlands and in the EU. In the Malta Declaration, it is stated that the key element for a sustainable migration policy is to ensure the effective control of our external borders and to stem illegal flows into the EU.³ Since the conclusion of the EU-Turkey Agreement, the influx of migrants from Turkey to Greece has decreased sharply.⁴ In contrast, the flow of migration from Libya to Italy has increased and in 2016 4'500 migrants lost their lives by crossing the Mediterranean in unseaworthy boats facilitated by unscrupulous smugglers. The EU intends to intensify its cooperation with Libya, the main country of departure, as well as with Libya's neighbouring North African countries. Australia also has its problems with the outsourcing of immigration control. Australia recently paid € 47 million to nearly 2'000

¹ See <<http://www.dutchnews.nl/news/archives/2017/06/prime-minister-very-disappointed-at-collapse-of-talks-with-groenlinks/>>.

² RODRIGUES PETER, EU-Turkey deal: Good on paper, bad in practice, Leiden Law Blog 2016, available at <<http://leidenlawblog.nl/articles/eu-turkey-deal-good-on-paper-bad-in-practice>>.

³ Malta Declaration of 3 February 2017; European Commission, State aid: Commission approves support for Delimara Gas and Power Energy Project in Malta, Press Release of 11 January 2017, IP/17/43.

⁴ The weekly average of sea border crossings dropped from ten to twenty thousand in 2015 to hundreds of asylum seekers in 2017. See Report from the Commission to the European Parliament, the European Council and the Council of 13 June 2017, Sixth Report on the Progress made in the implementation of the EU-Turkey statement, COM (2017) 323 final, p. 3.

asylum seekers in compensation for being held in a remote detention centre in Papua New Guinea for more than two years.⁵

In this contribution I will address current trends in immigration and asylum and discuss the aforementioned EU–Turkey Agreement. A heavily debated question that was raised about this agreement is whether it is in compliance with public international law. The EU Dublin Regulation, which requires the reception of asylum seekers by the first Member State of entrance, is controversial.⁶ The Dublin system places the burden of the reception of asylum seekers on the Member States located at the external borders of the EU. The causes of the controversy surrounding the Dublin Regulation will undergo close examination. As a result of the migration crisis of 2015, when 1.2 million asylum seekers entered the EU, the Schengen Border Code is under pressure. Some Member States have reintroduced border controls. New measures to regulate immigration flows and to provide security under the Schengen rules will be further investigated.

II. Current Trends in Immigration

Since World War II, there have never been so many people on the run and looking for protection than in 2016: 65.6 million.⁷ The majority of them are Internally Displaced Persons (40.3 million), who are seeking a safe refuge within their own country.⁸ Even though children make up an estimated 31 per cent of the total world population, in 2016 their contribution to the refugee population was 51 per cent. This percentage was 41 in 2009.⁹ This in-

⁵ See <<https://www.rte.ie/news/2017/0614/882597-asylum-seekers-australia-png/>>.

⁶ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31.

⁷ UNHCR, KASAMANI ISAAC, Global Trends, Forced displacement in 2016, available at <<http://www.unhcr.org/globaltrends2016/>>.

⁸ In 2016 the amount of refugees is 22.5 million and asylum seekers 2.8 million.

⁹ Ibid.

creased number of children is a serious problem because of their vulnerability: they are more likely to be victims of human trafficking, labour exploitation, sexual abuse or to become separated from their families. In the context of the migration crisis, the number of child migrants arriving in Europe has increased significantly. In 2015 and 2016, 30 percent of asylum applicants in the EU were children. Children have a right to be protected, and based on Article 24 EU Charter of Fundamental Rights (the Charter) the child's best interests must be the primary consideration in all actions or decisions concerning children. On 12 April 2017, the European Commission (EC) outlined priority actions regarding children in migration. The EC is proposing a number of priority areas for Member States to focus on in order to improve the protection of children in migration and to ensure a closer link between the asylum and child protection services.¹⁰

In 2016, 1'204'300 first-time asylum seekers applied for international protection in the Member States of the EU, a number slightly down compared to 2015 (1'257'000) but almost double that of 2014 (562'700).¹¹ Syrians (334'800), Afghans (183'000) and Iraqis (127'000) remained the main countries of origin of the asylum seekers in the EU Member States in 2016, accounting for slightly more than half of all first-time applicants. Six out of ten asylum seekers applied for asylum in Germany.

In 2016, by far the most people fleeing were from Syria (5.5 million), followed by Afghanistan (2.5 million), while South Sudan had the third most people (1.4 million).¹² It is remarkable that more than half (55 per cent) of all refugees worldwide came from only these three countries and it demonstrates that immigration is not just a matter of law, but much more a geopolitical issue. Interference by the world community in the case of a humanitarian crisis such as in the case of Syria directly affects immigration flows.

¹⁰ Communication from the Commission to the European Parliament and the Council of 12 April 2017, The protection of children in migration, COM(2017) 211 final.

¹¹ Eurostat, Asylum in the EU Member States, 1.2 million first time asylum seekers registered in 2016, newsrelease of 16 March 2017, 46/2017, available at <<http://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1>>.

¹² Report from the Commission to the European Parliament, the European Council and the Council (footnote 4). In 2015 Somalia was on the third spot.

Interference through diplomacy, economic sanctions or as a last resort even armed intervention could possibly prevent people from fleeing their country of origin.

The top three host countries are Turkey (2.9 million), Pakistan (1.4 million) and Lebanon (1.0 million).¹³ Turkey hosts more asylum seekers than all the Member States of the EU together. Lebanon has the largest number of asylum seekers in relation to its national population: one in six residents in Lebanon are refugees. Developing regions hosted 84 per cent of the world's refugees under UNHCR's mandate. The least developed countries provided asylum to a growing proportion of asylum seekers and these facts make the EU policy concerning reception in their own region questionable as the vast majority are already there.

III. EU-Turkey Agreement

On 18 March 2016, the EC and the Turkish government concluded an agreement with respect to the influx of migrants from Turkey to Greece.¹⁴ The goals of the agreement were to break the business model of the people smugglers and to offer migrants an alternative to putting their lives at risk. The agreement consists of nine Action Points.¹⁵

1. Returns to Turkey and Resettlements to the EU

The first Action Point states that all new irregular migrants crossing from Turkey to the Greek islands will be returned to Turkey as of 20 March 2016. The transfer of asylum seekers to a third country like Turkey is only permissible if there is an individual determination of the claim, legal representation, appeal and the prohibitions of collective expulsion and non-refoulement

¹³ Ibid.

¹⁴ PEERS STEVEN, The final EU-Turkey refugee deal: a legal assessment, EU Law Analysis 2016, available at <<http://bit.ly/291KuRR>>.

¹⁵ Council of the EU, EU-Turkey Statement, Press Release of 18 March 2016, 144/16, available at <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

should be taken into account. The latter is the prohibition to return (“refouler”) a refugee to the frontiers of territories where his life or freedom would be threatened.¹⁶ Last but not least, it is questionable whether Turkey can be considered a safe third country.¹⁷

However, it is stated in the agreement itself that the return of migrants to Turkey will be in full accordance with European and international law. It is required that there will be no collective expulsions and that the prohibition of non-refoulement will be respected. According to the agreement, migrants arriving on the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive¹⁸ and in cooperation with UNHCR. Consequently, according to the text of the first Action Point, the application of the agreement will be in accordance with the Refugee Convention and European Asylum Law.

The Agreement stipulates that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to an EU Member State. According to the 6th report on the Progress made in the implementation of the EU-Turkey Agreement, 6’254 Syrians have been resettled.¹⁹ The amount of returns to Turkey is even lower: 1’798.²⁰ These returns concern negative decisions, withdrawals or no asylum claim at all. In sum, there are more arrivals in Greece than returns in Turkey, which places pressure on the hot spots (reception centres) in Greece. If an asylum application is denied, the migrant has legal remedies and is able to appeal to the Greek Appeal Committees. These Committees are rather slow in decision making and mostly confirm the first-instance decisions (1’399 cases).²¹ The

¹⁶ Article 33(1) Refugee Convention.

¹⁷ See next paragraph.

¹⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60.

¹⁹ Report from the Commission to the European Parliament, the European Council and the Council (footnote 4), p. 9.

²⁰ Ibid, p. 5.

²¹ Ibid, p. 6.

Committees have reversed a decision in 17 cases and one of these cases is pending to the Council of State and concerns the requirements of safe third countries. In June 2017, the European Court of Human Rights (ECtHR) granted an interim measure under Rule 39 of the Rules of the Court to prevent the return of a rejected asylum seeker to Turkey under the EU-Turkey Agreement.²² The applicant, a national of Pakistan and member of the Ahmadi minority, had had his asylum application rejected as unfounded in both first and second instance. An application for interim measures has been filed before the Administrative Court of Mytilene against his readmission to Turkey, even though such measures have no suspensive effect under national law. The ECtHR requested the Greek authorities to suspend the return of the individual to Turkey until the Administrative Court issues its decision.

2. Safe Third Country

Article 38 Asylum Procedures Directive formulates the requirements for a safe third country.²³ First, the prohibition of refoulement has to be respected i.e. the prohibition of a removal which is in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law. Second, it should be possible to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. To be qualified as a safe third country, the Asylum Procedures Directive furthermore requires the ratification and compliance of the Refugee Convention without a geographic limitation. Turkey has implemented the geographic limitation and therefore only European asylum seekers are eligible for asylum in Turkey.²⁴ The Turkish Law on Foreigners and International Protection provides for a status of ‘conditional refugee’ for non-

²² Greek Council for refugees, Press Release of 30 June 2017, available at: <http://www.gcr.gr/index.php/el/news/press-releases-announcements/item/674-deltio-typou-tou-esp-gia-asfalistika-metra-apo-edda?utm_source=ECRE+Newsletters&utm_campaign=2966e52c3e-EMAIL_CAMPAIGN_2017_06_30&utm_medium=email&utm_term=0_3ec9497afd-2966e52c3e-420543009>.

²³ Directive 2013/32/EU (footnote 18).

²⁴ UNHCR, Global Appeal 2008 – 2009, available at: <<http://www.unhcr.org/474ac8e60.pdf>>.

Europeans, with temporary protection and no access to the labour market.²⁵ In January 2016, Turkey introduced a new regulation for Syrians. Even assuming that these regulations are now in place and applied in practice, they do not apply to Iraqi and Afghan asylum seekers and therefore this regulation violates the principle of non-discrimination of Article 3 of the Refugee Convention.

The agreement also contains a provision that Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU. Nevertheless, the flow of migrants from Libya to Italy demonstrates the waterbed effect of these measures. Looking at the Malta Agreement, it seems to me that a similar agreement of the EC and Libya would not be possible due to the fact that this country does not fulfill the requirements of a safe third country at all, considering the severe human rights infringement reported by the United Nations Office of the High Commissioner of Human Rights (OHCHR).²⁶

3. Relocation from Greece and Italy

A temporary emergency relocation scheme was established in two Council Decisions in September 2015, in which Member States committed themselves to relocating persons in need of international protection from Italy and Greece.²⁷ The relocation decisions concern the commitment to relocate 98,255 asylum seekers, after the Council adopted an amendment on 29 September 2016 to make 54'000 places not yet allocated available for the purpose of legally admitting Syrians from Turkey to the EU. As of 9 June 2017, the total amount of relocated asylum seekers stands at 20'283 (6'458 Italy

²⁵ Unofficial English translation is available at <<http://www.refworld.org/pdfid/5167fbb20.pdf>>.

²⁶ See <<http://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?CID=LY>>.

²⁷ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80.

and 13'766 Greece).²⁸ The relocation process aims to share the burden of the reception of asylum seekers from the external border Member States Italy and Greece. The European Council has called for an acceleration of the implementation of relocation in order to alleviate the humanitarian situation in Greece and the urgent need to provide support to Greece and Italy. The EU Relocation Scheme is closely connected to the EU-Turkey Agreement and priority is given to migrants who have not previously entered or tried to enter the EU irregularly and to unaccompanied minors.²⁹ Unfortunately, there is no common opinion among the Member States about the relocation and resettlement scheme of the Council. Whilst progress has been achieved, there are Member States who are still far from reaching their targets and others have not even undertaken any action. For that reason, the EC has started infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the 2015 Council Decisions on relocation.³⁰ According to the EC, contrary to its legal obligations, Hungary has not participated in the scheme and Poland has refrained from relocating asylum seekers since December 2015. The Czech Republic has not relocated any asylum seekers since August 2016. Austria did not participate either, but due to the formal pledge to relocate 50 asylum seekers from Italy it has avoided an infringement procedure.

IV. Dublin Regulation

After Dublin I (1990) and Dublin II (2003) the current regulation is now Dublin III which has been in force since 1 January 2014.³¹ The Dublin Regulation, together with the Qualification Directive, the Asylum Procedures

²⁸ Report from the Commission to the European Parliament, the European Council and the Council of 13 June 2017, Thirteenth report on relocation and resettlement, COM (2017) 330 final.

²⁹ Ibid, p. 4.

³⁰ European Commission, Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland, Press Release of 14 June 2017, IP/17/1607, available at <http://europa.eu/rapid/press-release_IP-17-1607_en.htm>.

³¹ Regulation (EU) No 604/2013 (footnote 6).

Directive and the Reception Directive, forms the so-called Common European asylum System (CEAS). The main objective of the CEAS is to harmonise the asylum laws of the Member States, so that it should make no difference in which Member State the application of an asylum seeker for protection is determined. Notwithstanding the fact that each Member State has to implement the directives in its own domestic legislation, there are still differences between domestic asylum laws.³² To tackle this problem, the EC has recently proposed replacing the current directives in the CEAS with regulations that are directly applicable in all Member States without implementation in national law.³³ In this contribution, I will only discuss Dublin III and where relevant its predecessors.

1. Dublin III

Dublin III establishes a hierarchy of criteria for identifying the Member State responsible for the examination of an asylum claim in the EU. This is on the basis of responsibility assigned to the State through which the asylum seeker first entered, or the State responsible for their entry into the EU (or Norway, Iceland, Liechtenstein and Switzerland). Dublin III contains procedural safeguards such as the right to information, a personal interview and access to remedies, as well as a mechanism for early warning and crisis management. Areas of concern include the use of detention to enforce transfers of asylum seekers,³⁴ the separation of families and protection of children,³⁵ no available

³² DEN HEIJER MAARTEN/RIJPMAN JORRIT/SPIJKERBOER THOMAS, Coercion, prohibition, and great expectations, The continuing failure of the Common European Asylum System, *Common Market Law Review* 2016, iss. 3, pp. 607-642.

³³ See Meijers Committee: CM1614 Comments on the proposals for a Qualification Regulation (COM [2016] 466 final), Procedures Regulation (COM [2016] 467 final), and a revised Reception Conditions Directive (COM [2016] 465 final), available at <<http://www.commissie-meijers.nl/en/comments>>.

³⁴ POLI THOMMASO, Immigration detention and the rule of law: the ECJ's first ruling on detaining asylum-seekers in the Dublin system, *EU Law Analysis*, 5 May 2017.

³⁵ PEERS STEVE, The Dublin Regulation: Is the End Nigh? Where should unaccompanied children apply for asylum?, *EU Law Analysis*, 21 January 2016.

effective remedies to appeal against transfers³⁶ and the limited use of the discretionary provisions within Dublin III to prevent these problems.³⁷

The main objective of Dublin is to prevent forum shopping by asylum seekers. Migrants did not remain in Greece or Italy, but were passing through to other Member States like France, Germany and the UK. It was actually a North-South issue and the consequences of the Dublin Regulation are overcrowded reception centres and long-lasting asylum procedures in the Member States at the EU external borders and huge obstacles for asylum seekers who want to pass through. The CEAS should create harmonisation in international protection and is based on mutual trust and solidarity between Member States. In the current situation there is no system of fair distribution and no reception based on capacity.

From August till November 2015 Germany did not apply Dublin III and handled the asylum applications of Syrian asylum seekers, even though according to the Dublin III regulation Germany was not responsible for doing so.³⁸ This policy of “Wir schaffen das” has been criticized by other Member States because it was an infringement of the Dublin Regulation and put other Member States under pressure to provide more protection for Syrian asylum seekers.³⁹ I do understand the critical remarks, but on the other hand the question could be raised whether the Dublin Regulation should be interpreted strictly under these kinds of extreme circumstances.⁴⁰

³⁶ See Judgement of the ECtHR (Grand Chamber) of 21 January 2011, *M.S.S. v. Belgium and Greece*, 30696/09, in the next paragraph.

³⁷ Case C-648/11, Judgement of the Court (Fourth Chamber) of 6 June 2013, *The Queen v. Secretary of State for the Home Department*, available at <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=138088&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=810856>>.

³⁸ See <<http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/dublin>>.

³⁹ MAYER MATTHIAS, *Germany's Response to the Refugee Situation: Remarkable Leadership or Fait Accompli?*, Newpolitik, Washington 2016, pp. 9-19.

⁴⁰ AG Sharpston concluded in a similar way in the cases C-490/16 and C-646/16 (*A.S. and Jafari*), but the ECJ did not in the case C-646/16.

The EC published the evaluation of Dublin III on 18 March 2016.⁴¹ Out of the 84'000 requests for transfers in 2014, only 4'500 transfers actually took place. That is little more than 5 per cent of all requests. Even though Dublin III is a regulation and not a directive, it needs to be applied by the Member States. There are different operational structures in the Member States, differentiation in time frames, differences in evidence required by the responsible Member State and no similar protection of the best interests of the child. Is Dublin III dysfunctional?

2. ECtHR 21 January 2011 (M.S.S. v. Belgium and Greece)

On some occasions Dublin has proven to be dysfunctional. Based on the judgment of the European Court of Human Rights (ECtHR) in the case of *M.S.S. v. Belgium and Greece*,⁴² I conclude that EU Member States may not return asylum seekers to Greece because the Greek asylum procedure is not in accordance with human rights standards. According to the ECtHR, the applicant in *M.S.S.* faced a real risk of being deported from Greece to Turkey and from Turkey to Afghanistan, without any consideration of his asylum claim. The Belgian immigration service returned him to Greece after a notification in EURODAC identifying this as the country of first entrance. The Court considers that the applicant was the victim of humiliating treatment showing a lack of respect for his dignity. It considers that such living conditions, combined with the prolonged uncertainty in which he remained and the total lack of any prospect of his situation improving, attained the level of severity required to fall within the scope of Article 3 of the European Convention of Human Rights (ECHR).⁴³ Not only during his detention and asylum procedure, but also for subjecting him to inhuman living conditions after his release. This is quite remarkable, as the Court accepts that socio-economic harm can amount to inhuman treatment in the meaning of Article 3 ECHR.

⁴¹ European Commission, Directorate-General Migration and Home Affairs, Evaluation of the Implementation of Dublin III Regulation, final report of 18 March 2016.

⁴² Judgement of the ECtHR (Grand Chamber) of 21 January 2011, *M.S.S. v. Belgium and Greece*, 30696/09.

⁴³ *Ibid.*, consideration 263.

The consequence of the judgment was the suspension of the Dublin transfers to Greece. The principle of mutual trust that every Member State acts in compliance with CEAS was broken. Could there be such deficiencies in other Member States, like Italy, Malta or Hungary? In the case *Tarakhel v. Switzerland*, the ECtHR requested special guarantees from Italy regarding the reception facilities for a family with minor migrants.⁴⁴ The conclusions with respect to Greece were repeated by the ECtHR in autumn 2015. Considering the mass influx of asylum seekers into Greece in recent years, it is highly uncertain whether the Greek asylum system is currently in accordance with EU Asylum Law. The EC has no doubts about the quality of the asylum law in Greece and announced that Dublin returns are possible as of mid-March 2017.⁴⁵

3. ECJ 21 December 2011 (N.S. v. UK)

In a similar way, the Court of Justice of the European Union (ECJ) concluded in the case of *N.S.* that there are systemic failures in the Greek asylum procedure and in the reception conditions of asylum seekers.⁴⁶ A Member State may not transfer an asylum seeker to a 'Member State responsible' where it cannot be unaware of systemic deficiencies in the asylum procedure and in the reception conditions. Dublin III prescribes that if such deficiencies are present, the host State must examine the asylum application itself or examine whether a third Member State can do so. In 2010 Greece was the point of entry of 90 per cent of all irregular migrants. The reason was not indifference or laxity by the Greek migration authorities, but mainly the geographical position of Greece in the EU. The ECJ states that Dublin should be applied in accordance with fundamental rights. A safe country is not only one that has ratified the Geneva Convention, but also one that observes the pro-

⁴⁴ Judgement of the ECtHR (Grand Chamber) of 4 November 2014, *Tarakhel v. Switzerland*, 29217/12.

⁴⁵ European Commission, Commission reports on progress made under the European Agenda on Migration, Press Release of 8 December 2016, IP/16/4281, available at <http://europa.eu/rapid/press-release_IP-16-4281_en.htm>.

⁴⁶ Case C-411/10, Judgment of the Court (Grand Chamber) of 21 December 2011, *N.S. v. Secretary of State for the Home Department*.

visions thereof.⁴⁷ Return to Greece would entail a real risk of being subject to inhuman or degrading treatment according to Article 4 Charter.

4. Indirect Refoulement

The indirect removal of a person to an intermediary country, which is also a Contracting Party, leaves the responsibility of the transferring State intact, and that State is not to deport a person where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 ECHR in the receiving country.⁴⁸ Would the transfer from Belgium to Greece constitute indirect refoulement? This was stated by the Helsinki Committee in the case of M.S.S. if the applicant were expelled from Greece to Turkey and from Turkey to his country of origin, Afghanistan. The indirect removal of a person to a Member State leaves the responsibility of the transferring State intact. That State should not deport a person, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 ECHR in the receiving country. Belgium should not have assumed that the applicant would be treated in conformity with Convention standards. It should first have verified how the Greek authorities had applied their legislation on asylum in practice. According to the ECtHR, Belgium had violated Article 3 ECHR by exposing the applicant to the risks of a deficient asylum procedure in Greece which amounted to a prohibited 'indirect refoulement'.⁴⁹

Currently a revised version, named Dublin IV, is being proposed by the EC.⁵⁰ It could be an improvement, but I have a strong preference for using the

⁴⁷ Ibid., consideration 102.

⁴⁸ Judgement of the ECtHR, M.S.S. v. Belgium and Greece (footnote 42), consideration 342.

⁴⁹ See also Judgement of the ECtHR, M.S.S. v. Belgium and Greece (footnote 42), consideration 347.

⁵⁰ Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member

existing regulation in a better way and repairing the mutual trust and solidarity between Member States based on fair distribution and reciprocity.

V. Schengen

In the Schengen Area, 26 Member States have agreed to abolish their internal borders⁵¹ for the free and unrestricted movement of people, goods, services and capital. This should occur in harmony with common rules for controlling external borders and fighting crime by strengthening common judicial systems and police cooperation.⁵²

1. Database Systems

The mechanisms through which the Schengen Area protects its citizens' security and identifies fraud with regard to travel documents, coming from prohibited individuals to enter the Schengen Area, are listed below.

In the first place, the Visa Information System (VIS) is a supporting database system of the Schengen Area's security that serves as an instrument to exchange data for short-stay visa applications between Schengen countries. VIS is helpful in preventing visa shopping, identity fraud and can be used in the detection of criminals.

Secondly, the Schengen Information System (SIS) which is another supporting database system for Schengen Area security serves as a tool to exchange data between Schengen countries regarding suspected criminals, individuals who might not have the right to enter and reside in the Schengen Area, stolen or lost assets as well as missing people. SIS supports the detection of entry bans of Third Country Nationals (TCN), can trace stolen cars and facilitates judicial cooperation between Member States.

States by a third-country national or a stateless person of 4 May 2016, COM (2016) 270 final.

⁵¹ Not: Bulgaria, Cyprus, Ireland, Croatia, Romania and the UK.

⁵² See <<https://www.schengenvisainfo.com/schengen-visa-countries-list/#qYLSMVdWG1tIJYoz.99>>.

Thirdly, there is the European Dactyloscopy (EURODAC), which is also a supporting mechanism to ensure the security of the Schengen Area and the European Union. EURODAC is a fingerprint database which is used to identify asylum seekers and illegal border-crossers by comparing fingerprint datasets. EURODAC supports Dublin Regulation, helps trace criminals and fights serious crime and terrorism and irregular border-crossing throughout Schengen and the EU. All the aforementioned security mechanisms of the Schengen Area and the EU are managed by EU-LISA, an EU Agency for large-scale systems.

2. Security

As mentioned above, during the migration crisis of 2015 around 1.2 million asylum seekers entered the EU. The current overall situation continues to stabilise, but there are still a significant number of asylum seekers in Greece. This makes relocation urgent in order to reduce the pressure on Greece and Italy and to prevent irregular migration between Member States. In 2015, certain Member States re-introduced border controls:⁵³

- Austria: at the Austrian-Hungarian and Austrian-Slovenian land border;
- Germany: at the German-Austrian land border;
- Denmark: in Danish ports with ferry connections to Germany and at the Danish-German land border;
- Sweden: in Swedish harbours in the Police Region South and West and at the Öresund bridge;
- Norway: in Norwegian ports with ferry connections to Denmark, Germany and Sweden.

The re-introduction of border controls is in accordance with the Schengen Border Code (SBC)⁵⁴ and took place after consulting the European Commis-

⁵³ European Commission, Commission takes new steps to enhance compliance and practical functioning of the EU Single Market, Press Release of 2 May 2017, IP/17/1086, available at <http://europa.eu/rapid/press-release_IP-17-1086_en.htm>.

⁵⁴ Art. 29 SBC.

sion. Since 1.7 million EU citizens commute to another Member State every day, border control must be targeted and limited in scope, frequency, location and time to what is strictly necessary.⁵⁵ The measures should be temporal, but due to the terrorist attacks in Belgium, France, Germany and the UK, the urgency concerning security has increased.

According to the EC, irregular migration from Greece to other Member States created exceptional circumstances constituting a serious threat to public policy and internal security and endangering the overall functioning of the Schengen area. The Council has already prolonged the current limited internal border control three times, in total for 12 months. On 2 May 2017 the EC recommended that the Council prolong controls for the last time, meaning they will have to be lifted in six months' time.⁵⁶ The EC is also recommending that all Schengen States make more effective use of proportionate police checks. These checks include border areas to remedy threats to public policy or internal security. The Commission considers that proportionate police checks could prove more efficient than internal border controls as they can be applied in a more flexible manner and are easier to adapt to evolving risks. The checks should be carried out in border areas and along main transport routes.⁵⁷

These checks after border passing are already done in Dutch practice.⁵⁸ Since 2015 the checks have been intensified, in accordance with the SBC. The ECJ decided in the case of *Adil v. the Netherlands*⁵⁹ that the SBC is not precluding national legislation which enables officials responsible for border sur-

⁵⁵ European Commission, White Paper on the Future of Europe of 1 March 2017, COM (2017) 2025, p. 11.

⁵⁶ European Commission, Back to Schengen: Commission recommends phasing out of temporary border controls over next six months, Press Release of 2 May 2017, IP/17/1146, available at <http://europa.eu/rapid/press-release_IP-17-1146_en.htm>.

⁵⁷ Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area, JO L122/79.

⁵⁸ Other Member States with checks after border passing are Austria, Belgium, Czech Republic, Germany, Denmark, France, Italy and Slovenia (and Switzerland).

⁵⁹ Case C-278/12, Judgement of the Court (Second Chamber) of 19 July 2012, *Atiqullah Adil v. Netherlands*; see also: Commission Recommendation (EU) 2017/820 (footnote 57), consideration 3.

veillance and the monitoring of foreign nationals to carry out checks within a geographic area of 20 kilometres from the State border.⁶⁰ They may be carried out based on general information and experience-based data. The checks have to be selective and thus not systematic like border control checks. The ECJ established in 2010 that in this case Member States must provide specific provisions in relation to the intensity and frequency of such controls.⁶¹ Research in the Netherlands demonstrates that these checks have only a limited effect and that there is a serious risk of ethnic and religious profiling.⁶² The EC mentions that these checks should fully respect fundamental rights and in particular the principle of non-discrimination.

British Prime Minister Theresa May said after the terrorist attack in London that human rights laws will be changed ‘if they get in the way’ of the country’s fight against terror.⁶³ Her statement seems to me to be a misperception, because security is based on an essential human right, namely the right to life (Article 2 ECHR and Article 2 Charter). There is no contradiction between security and human rights; they are two of a kind. Theresa May proposed administrative detention without a criminal charge. When considering new instruments, like checks after border passing, there should always be a threefold check to determine whether these measures:

⁶⁰ See also: Case C-9/16, Judgement of the Court (First Chamber) of 21 June 2017, Criminal proceedings against A, Request for a preliminary ruling from the Amtsgericht Kehl.

⁶¹ Joined Cases C-188/10 and C-189/10, Judgment of the Court (Grand Chamber) of 22 June 2010, Melki and Abdeli.

⁶² DEKKERS TIM/VAN DER WOUDE MAARTJE, Acceptance Denied: Intelligence-led Immigration Checks in Dutch Border Areas, *European Journal of Policing Studies* 2016, iss. 4, pp. 242-264.

⁶³ See <<http://edition.cnn.com/2017/06/07/europe/theresa-may-terrorism-human-rights/index.html>>.

- fulfil the European principles of proportionality and subsidiarity;⁶⁴
- take into account fundamental rights;⁶⁵
- could not be replaced by a better use of the existing instruments.

Are checks after border passing effective? Limited hits and many stops of citizens could lead to disproportionality of the measure.

Is the EU-Turkey Agreement in accordance with human right standards? The Charter is also applicable in the case of the return of asylum seekers to Turkey. Concerning existing instruments, it is remarkable that there have been no serious discussions in the EU about making use of the Temporary Protection Directive in 2015.⁶⁶ It was implemented in 2001 after the crises in Former Yugoslavia as an instrument to solve problems of mass influx of migrants in the EU and to provide protection to persons who are displaced by wars, violence and human rights violations.⁶⁷ It also provides a burden-sharing mechanism for the EU Member States. Upon the request of a majority in the Council, the EC can activate the directive.

VI. Conclusions

Migration is still on the move and more people than ever since World War II are on the run. If the EU and its Member States are considering external processing of the asylum procedure, they should be aware that 84 per cent of all asylum seekers are already received in their own region. External processing does not take away the responsibility to take fundamental rights into

⁶⁴ European Commission, Annual report 2016 on Subsidiarity and proportionality of 30 June 2017, COM (2017) 600 final.

⁶⁵ Charter and ECHR.

⁶⁶ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212.

⁶⁷ INELI-CIGER MELTEM, Time to Activate the Temporary Protection Directive, *European Journal of Migration and Law* 2016, Vol. 18 iss. 1, pp. 1-33.

account. The Charter is still applicable and the third country should not only have ratified the Refugee Convention but also practice the legal rights of this treaty. This is also one of the conditions to qualify as a safe third country. An agreement such as the EU-Turkey Agreement must meet this standard and it is questionable whether Turkey fulfils these requirements.

The prevention of a humanitarian crisis seems to be in everyone's best interest. Solidarity with other countries entails developing assistance, peace keeping and the prevention of humanitarian disasters. The root causes of forced migration should be tackled and under certain circumstances this could lead to interventions, either political or economic, and finally, when all else fails, military intervention by the world community.

In the EU there is a strong tendency to protect one's own State's interest where migration and security are involved. Examples are disagreement on the interpretation and enforcement of Dublin, non-compliance with relocation and resettlement agreements, and the re-introduction of border controls. Common responsibility, fair burden sharing and mutual trust are preconditions for the proper functioning of the Common European Asylum System.

Human Rights are not in conflict with security; they are both fundamental rights. The need to increase the safety of citizens should not entail a decrease in the human right standards. New EU measures must take fundamental rights into account and fulfil the European principles of proportionality and subsidiarity. Before proposing new measures to tackle current migration issues, the question should be answered as to whether the problem cannot be solved by means of making better use of existing instruments.